Supreme Court, U.S.
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In the
Supreme Court of the United States

THEODORE H. HOLMES and STARLA HOLMES
Plaintiffs-Petitioners

VERSUS

DAYBROOK FISHERIES, INC.
Defendant-Respondent

On Writs of Certiorari from the
Court of Appeal of Louisiana, Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Question No. 1.

Whether the Louisiana Fourth Circuit Court of Appeal failed to follow the United States Supreme Court precedent in *Scindia Steam Navigation Co. LTD., v. De Los Santos*, 451 U. S. 156, 101 S. Ct. 1614 (1981) when they ruled that a shipowner is not liable under the "turnover" duty even if it had actual knowledge of a unreasonable danger before the unloading process begun but failed to remedy the danger, which resulted in the injury to a longshoreman plaintiff?

Question No.2.

Whether the Louisiana Fourth Circuit Court of Appeal decided this Longshore and Harbor Worker's Compensation 905(B) action in conflict with the United States Court of Appeal, Second Circuit decision *Fanetti v. Hellenic Lines Ltd.*, 678 F. 2d 424 (2d Cir. 1982) when they ruled that the shipowner is relieved from primary responsibility to the condition of the workplace if the shipowner is also the stevedore company which employed the stevedore.

PARTIES TO THE PROCEEDING

Counsel for petitioners hereby sets forth that the only parties to this proceeding, including any parent, subsidiary or related companies who would have any interest in this matter, are the parties themselves, Theodore H. Holmes, Starla Holmes and Daybrook Fisheries, Inc.

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CITATION OF REPORTS OF CASE *SUB JUDICE*

1. *Theodore H. Holmes v. Daybrook Fisheries, Inc.*, Civil Action No. 39-165, Twenty-fifth Judicial District Court, Parish Of Plaquermines, State of Louisiana, 19 June 1998.

2. *Theodore H. Holmes v. Daybrook Fisheries, Inc.*, No. 98-CA- 1824, Court of Appeal Fourth Circuit, State of Louisiana, 730 So. 2d 1006, 24 February 1999.

3. *Theodore H. Holmes v. Daybrook Fisheries, Inc.*, 98-CA- 1824, Court of Appeal, State of Louisiana, 30 April 1999.

4. *Theodore H. Holmes v. Daybrook Fisheries, Inc.*, 99-C- 1571, Supreme Court, State of Louisiana, 24 September 1999 (Louisiana Supreme Court Certiorari denied).

5. *Theodore H. Holmes v. Daybrook Fisheries, Inc.*, 99-C-1571, Supreme Court, State of Louisiana, 12 November 1999. (Denial of Application for Rehearing).

STATEMENT REGARDING JURISDICTION

Theodore and Starla Holmes invoke the jurisdiction of this Court under 28 U. S. C. § 1257. In Louisiana, the judgment of the Court of Appeal of Louisiana is that of the highest court in Louisiana subject to discretionary, further review by the by the Supreme Court of Louisiana. Mr. and Mrs. Holmes have exhausted all avenues of further, discretionary review before the Supreme Court by petition for certiorari to the Louisiana Supreme Court which was denied on September 24, 1999. The Holmes subsequently filed a motion for rehearing with the Louisiana Supreme Court which was denied on November 12, 1999. The Holmes have now filed their application for certiorari with this Court. By doing so, the Holmes have timely invoked the jurisdiction of this Court as their petition for writ has been timely filed within ninety days after the last order of the Louisiana Supreme Court denying discretionary review by motion for rehearing. See Supreme Court Rule 13(l).

CONSTITUTIONAL PROVISIONS AND STATUTES APPLICABLE TO THIS CASE

Longshore and Harbor Workers' Compensation, 33 U.S.C. §905(b)

(b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agree-

ments or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed to provide shipbuilding, repairing, or breaking services and such persons' employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured persons' employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

STATEMENT OF THE CASE

This case concerns reparations for a debilitating fall that occurred as Theodore Holmes, a longshoreman employed by Daybrook Fisheries, Inc., bailed the cargo of M/V MARIA C, a menhaden fishing vessel also owned and operated by Daybrook Fisheries, Inc.. Theodore Holmes is a life-long resident of Plaquermines Parish, Louisiana and is mentally impaired. Daybrook Fisheries, Inc. employed Mr. Holmes as a bailer for nearly six years. Bailers' duties include unloading the fish catch after Daybrook's vessels return to the company's processing plant. Bailers unload the fish by entering the vessel's hold and using a high powered two-inch pressurized hose to blow the catch towards a larger hose that then collects the fish. Usually bailers enter the

hold by removing the vessels' hatch cover and manually lowering themselves thirty feet to the hold's floor. After the larger hose collects the fish, they are pumped into the processing plants. The water used in the bailing process is recirculated until the hold is empty. The combination of the fish slime, the smooth steel surface of the hold, and recirculated water creates a very slick environment.

On 19 April 1994, Mr. Holmes began bailing the hold of M/V MARIA C around 7:30 p.m. After clamping on his safety line, Holmes signaled for the water to be turned on. As Mr. Holmes bailed the fish, the combination of the fish slime and recirculated water made the hold's surface increasingly slippery. Holmes fell and suffered severe injuries while attempting to blow out the few remaining fish that had been trapped in a corner of the hold. Holmes related that the combination of the steepness of the hold, the slipperiness of the surface, and the dim light were factors that caused his fall.[1]

Holmes filed suit against Daybrook in the Twenty-Fifth Judicial District Court for the Parish of Plaquermines, Louisiana. Holmes argued that Daybrook was negligent as a vessel owner under 33 U.S.C §905(b) and sought damages. Both parties stipulated that Theodore Holmes was employed as a longshoreman aboard M/V MARIA C. It was also stipulated that Daybrook was insured by Louisiana Workers' Compensation Corporation for negligence claims brought pursuant to 33 U.S.C. §905(b), a section of The Longshore and Harbor Worker's Compensation Act (LHCWA). The par-

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[1] The vessel owner failed to provide adequate lighting for the hold at the time it "turned over" the vessel to the stevedore and its longshoremen.

ties stipulated that the only issues to be tried were negligence, the quantum of damages to be awarded to Theodore Holmes, the quantum of damages awarded to Starla Holmes for loss of consortium, and Theodore Holmes' comparative negligence, if any.

The district court conducted a non-jury trial on 12 December 1996. On 26 January 1998 the trial court held for Holmes, but also held him fifteen percent comparatively negligent. The court awarded damages for medical expenses, loss of income, and loss of consortium. *See Theodore H. Holmes v. Daybrook Fisheries, Inc.*, No. 39-165, slip. Op. at 3-5 (D. La. June 19, 1998).

Daybrook appealed to the Fourth Circuit Court of Appeal on three general grounds. Daybrook argued that the lower court applied an improper §905(b) vessel negligence analysis; committed manifest error in its holding that Holmes was only fifteen percent negligent; and that the trial court failed to credit Daybrook for the LHWCA benefits provided to the plaintiff by Daybrook.

The appellate court first held that Daybrook, as the stevedore, not the vessel owner, has the duty to provide longshoremen a safe place to work. The court then held, in a stunning move, that Daybrook, now considered only as the vessel owner, does not have a duty, for purposes of negligence liability, to provide a safe place to work and does not incur liability **when it had actual knowledge** of the potential hazards that caused Mr. Holmes' injuries. *See Theodore H. Holmes v. Daybrook Fisheries, Inc.*, No. 98-CA- 1824, slip op. at 4 (La. App. 4th Cir. Feb. 24, 1999),1999 WL 112352 (La. App. 4th Cir.).

The court then proceeded to attempt to factually distinguish cases relied upon by the plaintiff. The court weighed the conflicting testimony of the witnesses and made its own Judgment call and held that the defendant's only witness was more credible than all of those offered by the plaintiff. The court also held that the plaintiffs failed to make a valid §905(b) claim and that, in its view, the reasonable factfinder could not have found that Daybrook had been negligent. Thus, the court held that Daybrook had not breached any of it duties as a vessel owner. *See id.* at 4-9.

Holmes motioned for rehearing, which was denied on 30 April 1999. Holmes has petitioned certiorari of Louisiana Supreme Court, which was denied on 24 September 1999. Subsequently, the application for rehearing was also denied on 12 November 1999. Consequently, the petitioner filed this application for Certiorari of this Court.

RULE 10 STATEMENT REGARDING WRIT GRANT CONSIDERATIONS

1. The judgment that the petitioners urge this Court to review is that of Louisiana Fourth Circuit Court of Appeal dated 24 February 1999. In this judgment, the Fourth Circuit misquoted the opinion of this Court in *Scindia Stream Nav. Co., Ltd v. De Los Santos*, 451 U. S. 156, 101 S. Ct. 1614 (1981). The Fourth Circuit's opinion regarding the turnover duty of Daybrook Fisheries, Inc. has been misled by this misquote. It is wrong because it decreases the degree of care owed by the shipowner to a longshoreman. This opinion has created a perilous precedent in this 905(B) action.

In *Scindia*, the Court set forth a three-part duty owed by the shipowner to the longshoreman boarding its vessel.

At the first paragraph of page 1622 Section III, the Court discussed the scope of turnover duty, that is, prior to turning over the vessel a shipowner must '"exercise ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property, and to warning the stevedore of any hazards on the ship or with respect to its equipment that are known to the vessel or should be known..." *Id.* at 167 101 S. Ct. at 1622.

However, from the second paragraph of Section III to the following section IV, the Court shift its intention from the turnover duty to the second and third duty. From thereon, the Court began to address the vessel's duty under 905(b) once the stevedore's cargo operations have begun. The language relied upon by the Fourth Circuit in its conclusion that the actual knowledge of a dangerous condition is insufficient in and of itself to impose § 905(b) liability appears at page 1626 of Scindia opinion.

> As that court sees it, mere knowledge of the danger would not be sufficient in itself to fasten **such a duty** on the shipowner, but if the shipowner should anticipate that the stevedore will not or cannot correct the danger and that the longshoreman cannot avoid it, then the shipowner's duty is triggered to take steps, reasonable in the circumstances, to eliminate or neutralize the hazard."

Scindia, 101 S. Ct. at 1626.

It is evident from the context that the "duty" in the original text refers to the duty to intervene, not the turnover

duty. The real intent of this Court in Scindia is that mere knowledge of the danger would not be sufficient in itself to trigger the "duty to intervene", not the turnover duty, the reason being that the stevedore is in primary control of the confines of its operation and the shipowner is not charged with the intervention duty unless the conduct of the stevedore company is "obviously improvident". The misuse of the language decreases the importance of the actual knowledge of danger to the turnover duty. As indicated by a more recent Judgment of this Court, actual knowledge of danger is an important element of the turnover duty. *See Howlett v. Birkdale Shipping Co., S A*, 114 S. Ct. 2057, 129 L. E. 2d 78 (1994).

In *Howlett*, the longshoreman injured when he slipped and fell on a sheet of clear plastic placed under bags he was discharging from cargo hold on ship filed suit against vessel owner and operator under Longshoreman and Harbor Workers' Compensation Act. The issue was what was the scope of the shipowner's duty to warn of latent hazards in the cargo stow. *Howlett*, 512 U. S. 92, 95. In addressing this issue, the Court stated that the vessel's duty to warn is confined to latent hazards that "are known to the vessel or should be known to it in the exercise of reasonable care." *Id.* 512 U. S. at 98-99. Further the Court stated that "absent actual knowledge of hazard, then, the duty to warn may attach only if the exercise of reasonable care would place upon the shipowner an obligation to inspect for, or discover, the hazard's existence." In light of Howlett, it is evident that the Court had placed an emphasis upon the actual knowledge of shipowner as one of the elements of its turnover duty.

In the case at bar, the defendant actually knew the

conditions on the fishing vessels were slippery, the steel floor of the hold was steep and the boat had no interior lights inside the hold before the unloading begun, but it failed to remedy these hazards. It is also reasonably foreseeable that bailers will need to walk around the hold and will encounter these especially steep areas. The District Court correctly held that the combination of the steep steel floor, the insufficient lighting, the slipping water being recirculated in the hold and the inadequate safety equipment were the cause-in-fact of the plaintiff's injuries. However, the Fourth Circuit simply denied the importance of actual knowledge of shipowner and failed to follow *Howlett* and *Scindia*. This failure is a direct result of its misquote from the opinion of this Court in *Scindia*. Therefore, this opinion is clearly contrary to the law of this Court. Based upon these considerations, Theodore H. Holmes and Starla Holmes respectfully prays that his petition for writs of certiorari be granted.

II. The Louisiana Fourth Circuit Court of Appeal failed to give attention to a significant fact in this case, i.e., the shipowner is also the stevedore employer of the longshoreman. Amoung United States federal courts, the Second Circuit has held that the shipowner owes a "heightened" duty in this dual capacity situation.[2] This duty is on the shipowner, where there is no independent contractor, to exercise reasonable care to inspect its own workers' workplace, to remove grease spills, etc. *Fanetti v. Hellenic Lines Ltd,* 678 F. 2d 424,428(2nd Cir. 1982) (citing *Canizzo v. Farrell Lines,* 579 F. 2d 682, 689-90 (2d Cir. 1978). On the contrary, the Louisiana Fourth Circuit followed an approach in conflict with the Second Circuit. It separated the duty of

[2] See Second Circuit case *Fanetti v. Hellenic Lines*, 678 F. 2d 424 (2nd Cir. 1982); For a recent Second Circuit case, see Gravatt v. City of New York, 53 F. Supp. 2d 388 (S. D. N. Y. May 24, 1999).

employer in its shipowner capacity from that of his in stevedore capacity by following a U.S. Fifth Circuit case[3] Considering that United States Supreme Court has not had the occasion to analyze the vessel duties in a dual capacity case[4], the petitioners urge this Court to visit this issue and grant *certiorari* for this reason.

First, in the seminal 905(b) Supreme Court case *Scindia*, 451 U. S. 156 (1981), this Court emphasized that "the legal duties placed on the stevedore and the vessel's justifiable expectations that those duties will be performed are relevant in determining whether the shipowner has breached its duty." Id. at 176, 101 S. Ct. at 1626. Implicit in that analysis is the existence of an independent, expert stevedore upon whom the shipowner's "justifiable expectations" may reasonably fall. However, in a situation where the shipowner is also the stevedore who employs the longshoreman, the things are "very different." *See Canizzo v. Farrell Lines, Inc.*, 579 F. 2d 682, 689-690 (2d Cir. 1978). The "dual capacity" employer remains in control and often in complete control of the entire vessel and its appurtenances throughout the relevant time period. *DiGiovanni v. Traylor Bros., Inc.*, 75 F. 3d 748 (1st Cir. 1996). Thus, according to several courts, the fuller range of knowledge and foreseeability normally accompanying constant and total control represents a compelling reason for broad accountability in tort on the part of the "dual capacity" employer as ship owner. Id.

Second, unlike their "single capacity" counterparts, "dual capacity" vessel owners "presumably derive econom-

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[3] *Castorina v. Lykes Brothers Steamship Co., Inc.*, 758 F. 2d 1025 (5th Cir. 1985).

[4] In the latest Supreme Court case, *Jones & Laughlin Steel Corporation v. Pfeifer*, 462 U. S. 523 (1983), the negligence of the dual capacity defendant qua vessel had been conceded.

ic benefit as a result of their decision to act in a dual capacity." Several U. S. Circuit Courts had held that this benefit itself may well constitute an adequate counterbalance to whatever "heightened" duty of care may attend the shipowner's decision. In *Fanetti v. Hellenic Lines Ltd,* 678 F. 2d 424, 1982 A. M. C. 1521 (2nd Cir. 1982), relying on the reasons stated by the Court in *Napoli*, 536 F. 2d 505, 508, the Second Circuit held that:

> A shipowner is, of course, at liberty to refrain from hiring an independent stevedoring contractor. Presumable it does so to save money. However, that saving is accomplished at the cost of not having an independent expert on board. As myriad cases in the field demonstrate, the presence of the expert independent stevedoring contractor furnishes the shipowner with significant protection, in the form of insulation from liability for its own acts which would otherwise attach. But the shipowner cannot save the premium and still claim the protection.

In light of *Fanetti*, a dual capacity defendant is liable in its capacity as vessel owner for failing to provide workers aboard the vessel **with a safe place to work**. In U. S. Court of Appeal, Second Circuit, a charge which relieves a shipowner of liability for a dangerous condition which was "known to the stevedore or to any of its employees" is clearly inappropriate where the shipowner, itself, is the stevedore. *Napoli v. TransPacific Carriers Corp.*, 536 F. 2d 505, 508 (2n Cir. 1976). In *Gravatt*, a more recent case, the District Court reaffirmed the position in *Fanetti. Gravatt v. City of New York* 53 F. Supp. 2d 388 (S. D. N. Y. May 24, 1999).

On the contrary, the Fifth Circuit adopted a "metaphysical" approach in the duties of the shipowner stevedore.

Castorina v. Lykes Bro. Streamship Co. Inc., 758 F. 2d 1025 (5th Cir. 1985). In *Castorina*, a longshoreman who developed asbestosis after offloading asbestos from shipowner stevedore's vessels brought suit under LHWCA. The Fifth Circuit separated the negligence of the shipowner and that of the stevedore, and held that "the duty owed by a shipowner to a longshoreman under section 905(b) is that established by Scindia and its progeny; this duty is neither heightened nor diminished when the longshoreman is employed directly by the vessel." *Castorina*, 758 F. 2d 1033.

The *Castorina* decision has been criticized in recent years. The reality in the shipping world is that the shipowners remain in control of its entire vessel and its appurtenances throughout the relevant time period when they are also the stevedore companies. Permitting the dual-capacity employer to compartmentalize its "knowledge" between its two artificial personae in these circumstances would undercut the primary LHWCA policy goal identified in Scindia; that is, there would be no economic incentive for shipowner-employers to hire independent stevedoring companies, which generally possess greater expertise in conducting longshoring activities with maximum levels of worker safety. This economic concern had influenced the *Fanetti* decision, *DiGiovanni* decision and the dissent opinion by Judge Cyr in *Morehead v. Atkinson-Kiewit*, 97 F. 3d 603 (1st Cir. 1996). The recent *Gravatt* case in the U. S. District Court for the Southern District of New York further indicated the trend that the shipowner should bear more duty to correct the dangerous condition if he is also the stevedore companies. He simply cannot avoid the expenses of hiring an experienced stevedore and also enjoy the statutory immunity in its stevedore employer capacity.

In the case at bar, the Louisiana Fourth Circuit Court of Appeal relied on the reasoning in *Castorina* and held that the shipowner may rely on the expertise of itself In the stevedore capacity. This ruling significantly eliminates the protection normally given by a independent and experienced stevedore company. It has been a long time since the Supreme Court has visited the question § 905(b) negligence liability for entities that are both vessel owners and simultaneously stevedores. There has now arisen a conflict as to the construction and application of §905(b) in those instances. We believe the correct construction of §905(b) is that of the Second Circuit in *Fanetti* and not that of the Louisiana Fourth Circuit. Where, as here, Daybrook was found negligent and responsible on that basis for Mr. Holmes' injuries, §905(b) should be construed to provide Mr. Holmes a federal remedy and recovery on that basis. *Id.* 678 F.2d at 429-30. In light of the foregoing, we urge this court to grant certiorari and consider the question of law presented.

Respectfully Submitted,

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APPENDIX A

TWENTY-FIFTH JUDICIAL DISTRICT COURT

PARISH OF PLAQUEMINES

STATE OF LOUISIANA

NO. 39-165 DIVISION: A

THEODORE H. HOLMES

VERSUS

DAYBROOK FISHERIES, INC.

FILED: JUN 1 9 1998 /S/ Julie V. Cole

DEPUTY CLERK

REASONS FOR JUDGMENT

This Matter was tried before this Court on the date of December 12, 1996 and after the reception of all of the stipulations, testimony, depositions and exhibits and considering the memorandum of counsel, this Court, Pursuant to C.C.P. Article 1917 makes the following findings of fact and assigns the following reasons for judgment.

By stipulation of the parties this matter was tried on the issues of defendant and plaintiff negligence, if any, and quantum. The parties further stipulated that the Plaintiff was a lorgshoreman under the terms and definitions of the Longshore and Harbor Workers Compensation Act. The par-

ties stipulated as to the wages earned by the plaintiff for the years 1990 thru 1994 and the amount of medical and indemnity paid on behalf of the plaintiff.[1] The Parties also stipulated that the vessel MARIA C was owned by the defendant.

Plaintiff was a employed as a bailer by Daybrook Fisheries, Inc. Plaintiff was worked as a bailer for five or six years with his employer. Tle duties of the bailer were to unload the vessel's fish catch when the vessel returned to defendant's processing plant. T'he unloading of the vessel's catch was accomplished by the bailer entering the hold of the vessel and blowing the fish with a two inch(2") pressurized water hose into a twelve inch(12") hose. The fish were "blown" by the water pressure towards a pump which collected the fish in The 12" hose, It was the practice of the defendant to recirculate the water used in the bailing process until the hold was emptied of fish.

On April 19, 1994, plaintiff began his work day around 7:30 a.m. As his usual practice was he manually removed the vessel's hatch covers and descended thirty feet into the hold to the fish. He clamped on his safety line and signaled for the water to be turned on. As he moved through the hold of the vessel, the recirculating water and the scum from the fish made the surface of the hold very slippery. The only safety gear available to plaintiff to prevent his slipping was his treaded rubber boots. In addition to the slippery fish scum and the recirculated water, the floor of the hold of the MARIA C was inclined at a steep angle. It was necessary for plaintiff to ascend and descend the hull of the vessel to make

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[1] The following Wages were 1993-$11,121,80;1991-$13.931.45; 1992-$17,533.09;1993-$17,135.57 and 1994- $19,086.93. The stipulated medical expenses were $24,354.32 and the indemnity was $9,723.85.

sure that all of the fish were removed in the bailing process. It was while he was walking on the steep floor of the hold that plaintiff fell and injured himself. Plaintiff testified that as he fell on the steep, slippery, steel floor, the force from the high pressure water hose caused his head to hit the steel bulkhead of the vessel.

It was while plaintiff was walking on the inclined floor in the hold of the MARIA C that he fell and sustained his injuries. The Court finds that the lack of a slid proof and/or non-skid surface on the floor of the hold and the lack of proper safety equipment were contributing causes of plaintiff's injuries. Moreover, the Court finds that the evidence adduced at trial showed that there was improper lighting in the hold of the vessel. The hold of the vessel was only equipped with two (2) seventy-five watt light bulbs located in two separate fixtures. The Count further finds that the failure of the defendant to assure that an adequate supply of clean water was available for the bailing operation created an unusual risk of harm for the plaintiff The combination of the steep steel floor, the insufficient lighting, the slippery water being recirculated in the hold and the inadequate safety equipment were the cause-in-fact of plaintiffs injuries. The Court finds that it was foreseeable that the conditions found in the hold of the MARIA C created an unsafe work area in which plaintiff had to perform his work. The Court Finds that the defendant breached its duty to provide the plaintiff a safe place to work upon its vessel. Further, the Court finds that the methods employed by the plaintiff to complete his job duties as a bailer were the methods prescribed by the defendant. There is no testimony that plaintiff deviated from those prescribed methods. However, the Court finds that the plaintiff was not exercising ordinary care during the bailing procedure. The evidence shows that

as the bailing operation proceeded, the plaintiff noticed that the recirculated water was becoming slimy and took no steps to further protect himself from a possible fall. The Court assesses fifteen percent(15%) contributory negligence against the plaintiff.

The parties stipulated that as a result of the accident the plaintiff sustained a herniation of the C3-4 and C4-5 levels of his cervical spine. Dr. Charles Knox initially examined and treated the plaintiff on April 20, 1994. Dr. Knox diagnosed the plaintiff as sustaining a neck with muscle spasm. On May 6, 1994 the plaintiff was seen by Dr. Carl F. Culicchia, an orthopedic surgeon, who diagnosed the plaintiff as suffering from a C3-4 and C4-5 cervical disc. This diagnosis was made after Dr. Culicchia examined the plaintiff and MRI-1 scans of his neck. Plaintiff continued to be treated conservatively for his cervical complaints until April 26, 1996 when he underwent a an anterior cervical discetomy and fusion of the C3-4 and C4-5 levels of his neck. He was followed post-operatively by Dr. Bernard Manale, the orthopedic surgeon who performed the surgical procedure. As of January 27, 1997, Dr. Manale noted that the plaintiff still complained of neck pain. Mr. Holmes was assigned a permanent anatomical disability of 12% of the body as a whole. He was restricted from lifting, bending pushing or pulling objects of twenty pounds(20 lbs.) or more in weight. He was also cautioned to avoid repetitive twisting or turning of his neck.

Mr. Bobby Roberts, a certified vocational evaluation specialist and Mr. Tom Stewart, a licensed vocational rehabilitation counselor evaluated the future vocational prospects of Mr. Holmes. Both testified by deposition. The work history of Mr. Holmes as described by both witnesses

was limited. Mr. Holmes was for all intentional purposes was a manual laborer working in the fishing industry. He had, since leaving high school, worked on a shrimp boat and for Daybrook Fisheries, Inc. Mr. Holmes job classifications were unskilled heavy and unskilled medium.

Mr. Holmes was classified as "learning disabled" by Mr. Roberts. Plaintiff was found to be exhibiting borderline intellectual capabilities. He can only to pronounce words on a second grade level and to spell on a first grade level. Mr. Holmes has only achieved math skills to a fifth grade level.

It was the conclusions of plaintiffs vocational experts that he was only qualified by his expierence and education to engage in unskilled jobs. It was also their opinion that Mr. Holmes because of his physical limitations would only be suitable to engage in light or sedentary work. Defendant's vocational expert testified by deposition that Mr. Holmes was capable of engaging in light, unskilled employment. The Court finds that Mr. Holmes is disabled from engaging in his previous employment as a bailer and is limited to re-employment in an unskilled, light to sedentary job. The Court further finds that Mr. Holmes has an earnings capacity of $4.75 to $6.00 per hour based on his education, experience and physical limitations.

The Court accepts the findings of Dr. G. Randolph Rice. Plaintiff's economic expert calculated that Mr. Holmes past lost wage amounted to $ 45,716.00. Dr. Rice calculated Mr. Holmes future lost earning capacity as $ 214,126.00. Dr. Rice considered plaintiff's ability to engage in minimum wage employment.

The Court further finds that the sum of $30,000.00

will compensate plaintiff for his past physical pain and suffering and the sum of $50,000.00 will adequately compensate him for his future physical pain and suffering. The Court finds that prior to his injury plaintiff was engaged in physical activities such as playing basketball and football. After his injuries his wife had to work full time and the task of maintaining the home became his responsibility but because of his continuing pain he has to depend on her to most of the housework in addition to her full time employment. She also has to cut the grass and bring out the garbage, thing he use to do before his injury. Mr. Holmes further testified that his injuries has caused personal hardships between himself and Mrs. Holmes. Their sex life has been diminished and he cannot respond to his wife because of the pain he experiences.

The Court finds that the sum of $ 30,000.00 will adequately compensate the plaintiff for his past mental pain and suffering and the sum of $50,000.00 will adequately compensate the plaintiff for his future mental pain and suffering. Based in the stipulations of the parties, the Court awards plaintiff the sum of $29,354.32 in past medical expenses.

The Court finds that Starla Holmes and Mr. Holmes had a close and loving relationship prior the accident of April 19, 1994. The Court further finds that after plaintiff sustained his injuries the martial relationship between the Holmes began to deteriorate. Mrs. Holmes testified that Mr. Holmes became cross and irritable. His moods resulted in repeated arguments and gave rise to problems in other areas. Mrs. Holmes testified that prior to the accident they engaged in sexual relations approximately four times a week. She testified that after the accident, her husband's injury and the resultant pain reduced their sexual activity to maybe once a

week.

The Court finds that prior to Mr. Holmes' injury, Mrs. Holmes enjoyed the love, consortium, and support of her husband. The Court further finds that as a result of his injuries Mr. Holmes experienced a change in his personality and abilities that resulted in a loss of the comfort, support and consortium that Mrs. Holmes previously experienced in their relationship. The Court awards the sum of $25,000.00 to Mrs. Holmes for her loss of consortium.

For the foregoing reasons, judgment was entered on behalf of the plaintiff, Theodore H. Holmes, and against the defendant, Daybrook Fisheries, Inc., in the manner and in the amounts specified hereinabove with legal interest thereon from date of injury on all Past damages and legal interest thereon from date of judgment for all future damages, until paid, and for all costs of these proceedings.

Pointe-a-la-Hache, Louisiana this 19 day of June, 1998.

/S/ M.E. illegible

APPENDIX B

THEODORE H. HOLMES	*	NO. 98-CA-1824
VERSUS	*	COURT OF APPEAL
DAYBROOK FISHERIES, INC.	*	FOURTH CIRCUIT
	*	STATE OF LOUISIANA
	*	

* * * * * * * *

APPEAL FROM
PLAQUEMINES 25TH JUDICIAL DISTRICT COURT
NO. 39-165, DIVISION "A"
HONORABLE MICHAEL E. KIRBY, JUDGE

* * * * * *

JUDGE DENNIS R. BAGNERIS, SR.

* * * * * *

(Court composed of Judge William H. Byrnes III, Judge Joan Bernard Armstrong, Judge Dennis R. Bagneris Sr.)

STEPHEN M. WILES
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5044 LAPALCO BOULEVARD
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AND

TIMOTHY J. FALCON
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MARRERO, LOUISIANA 70072

COUNSEL FOR PLAINTIFF/APPELLEE

FEB 24 1999

REVERSED

RICHARD L. SEELMAN
WAYNE J. FONTANA
COURTNEY, FORSTALL, HUNTER 7 FONTANA
730 CAMP STREET
NEW ORLEANS, LOUISIANA 701303702

COUNSEL FOR DEFENDANT/APPELLANT

This maritime suit was brought by Theodore Holmes against Daybrook Fisheries, Inc. for injuries he sustained from a fall on a fishing vessel, owned and operated by defendant. After a non-jury trial, the trial court rendered judgment for plaintiff finding that the defendant breached its duty to provide plaintiff a safe place to work. The court awarded plaintiff $449,196.32 in total damages; in addition, the court awarded plaintiffs wife $25,000.00 for loss of consortium.

Daybrook Fisheries, Inc. appeals and assigns the following errors:

I. The trial court erred in holding that Daybrook as vessel owner was liable to the plaintiff under 33 U.S.C. § 905(b), as none of the allegations of 905(b) vessel owner negligence raised by the plaintiff involved vessel owner's duties set forth in the statute and jurisprudence interpreting it.

11. The trial court committed manifest error in holding that the plaintiffs comparative fault was only fifteen percent under the undisputed facts of this case.

111. The trial court erred in its judgment in failing to credit Daybrook for the LHWCA benefits provided to the plaintiff by Daybrook.

Because we find merit in defendant's first assignment of error, we find it unnecessary to review defendant's remaining assignments. We disagree with the trial court's finding that the defendant breached its duty to provide plaintiff with a safe place to work, therefore, we reverse.

FACTS

Plaintiff was employed by defendant, Daybrook Fisheries, Inc. (Daybrook) as a menhaden (hereinafter "pogy") bailer on the F/V MARIA C, which was owned and operated by Daybrook. On April 19, 1994, around 7:30 PM, after the vessel arrived dockside, plaintiff boarded the vessel, removed the hatch covers, and descended a ladder 30' into the hold of the vessel to begin unloading the fish. Plaintiff clamped his safety line and signaled to the hole-spotter atop to turn on the water. Plaintiff began to wash the pogy towards the trough of the hold, which was shaped in a deep "V", with a high powered hose, similar to that of a fireman's hose. At the bottom of the trough was a high-powered suction hose that would transport the fish from the vessel to the fish processing plant. As plaintiff neared the end of this process, he proceeded to ascend the incline of the hold and lost his footing, falling on his shoulder. Plaintiff continued to grasp the hose, which by its force threw plaintiff against the steel bulkhead causing him to hit his head.

Plaintiff incurred injuries as a result of the fall and brought suit against Daybrook alleging that Daybrook was liable to him under the Jones Act or in the alternative under the Longshoreman and Harbor Workers' Compensation Act (LHWCA). Prior to trial the parties stipulated that plaintiffs claim was based on the LHWCA. Since his injury, plaintiff has received workmen's compensation from Daybrook as his employer, but in the instant suit he seeks negligence damages from Daybrook as the owner of the vessel.

STANDARD OF REVIEW

Admiralty claims may be brought in federal court

pursuant to its admiralty jurisdiction or in state court under the savings to suitors clause; in either case, federal substantive maritime law applies. Antill v. Public Grain Elevator of New Orleans, Inc., 577 So.2d 1039 (La. App. 4 Cir. 1991), *writ denied*, 581 So.2d 684 (La. 1991). In an admiralty case, the appellate court reviews the district court's findings of fact for clear error and considers all questions of law de novo. Randall v. Chevron, U.S.A., Inc., 13 F.3d 888 (5 Cir. 1994), mod. on other grounds on *rehr'g*, 22 F.3d 568 (5 Cir. 1994), *cert. dismissed*, Sea Savage, Inc., v. Cheron, U.S.A. Inc., 512 U.S. 1265) 115 S.Ct. 5, 129 L.Ed.2d 906 (1994).

The parties disagree as to what standard of review applies; however, this court finds that regardless of which standard we apply the trial court's decision is contrary to the law.

DISCUSSION

Prior to 1972, the law allowed an injured longshoreman to recover workmen's compensation from his employer and bring suit against a ship-owner for unseaworthiness or negligence. However, the 1972 amendments to the LHWCA, which created 33 U.S.C. § 905(b), abolished the longshoreman's right to bring an unseaworthiness claim against a vessel owner, but preserved his right to bring a negligence claim. The purpose of this statute was to place the longshoreman "in the same position he would have been if he were injured in non-maritime employment ashore." S.Rep.No.92-1125, p. 10 (1972). Thus, the only cause of action an injured longshoreman may maintain against the vessel owner is for negligence in maritime tort, not for unseaworthiness.

In Scindia Steam Nav. Co., Ltd. v. De Los Santos, 451 U.S. 156, 101 S. Ct. 1614, 68 L.Ed.2d 1 (1981) the Supreme Court considered the extent of the duty owed to a longshoreman by the vessel owner. The Court concluded that under § 905(b) a vessel owner owes a duty to a longshoreman under limited circumstances:

1. The Turnover Duty

Prior to turning over the vessel a shipowner must "exercise ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property, and to warning the stevedore of any hazards on the ship or with respect to its equipment that are known to the vessel or should be known. . ."Id. at 167, 101 S.Ct. at 1622.

2. The Active Control Duty

Once the vessel is turned over and stevedore operations begin, the owner may rely on the stevedore to discharge his duties in a workmanlike manner, avoiding exposing longshoreman to unreasonable hazards. Id. at 170, 101 S.Ct. at 1624. Under this duty, absent contract provision, positive law, or custom to the contrary, "the shipowner has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore. Id. at 172, 101 S.Ct. at 1624.

3. The Intervention Duty

The shipowner may have a duty to intervene in

cargo operations when it becomes aware of a dangerous condition and the stevedore's continued operations are so "obviously improvident" as to "present an unreasonable risk of harm to the longshoreman." Id. at 175-176, 101 S.Ct. at 1626-27.

In Castorina v. Lykes Bros. S.S. Co., Inc., 758 F.2d 1025 (5 Cir. 1985), *cert. denied*, 474 U.S. 846, 106 S.Ct. 137, 88 L.Ed.2d 113 (1985) the United States Fifth Circuit Court of Appeal declined to impose a greater duty of care on a ship-owner when that owner is also the stevedore. Id. at 1032. However, the law remains constant that an injured longshoreman may recover from a vessel owner for negligence, even though the owner is also the employer. (*See*, Jones v. Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523, 103 S.Ct. 2541, 76 L.Ed.2d 768 (1983) for detailed discussion of longshoreman's right to bring a § 905(b) claim against an owner when owner wears "two hats.")

Despite this, an injured longshoreman may not assert an unseaworthiness claim by disguising it as a claim for negligence. To allow such an action would, in this court's opinion, thwart the purpose of the 1972 amendments. Thus, in reviewing the trial court's decision we are guided by these principles.

Daybrook contends that the four components the trial court cited as the cause-in-fact of plaintiff's injuries either relate to unseaworthiness claims or to stevedore negligence for which Daybrook, as vessel owner, can not be held liable under a § 905(b) analysis. We agree.

In its reasons for judgment, the trial court found that Daybrook breached its duty to provide plaintiff a safe

place to work because "the combination of the steep floor, the insufficient lighting, the slippery water being recirculated in the hold and the inadequate safety equipment were the cause-in-fact of plaintiff's injuries." In reviewing these reasons we find that the judge failed to distinguish between Daybrook as the vessel owner and Daybrook as the stevedore, and as a result placed a higher duty on Daybrook as the owner, in contravention of Castorina.

Statutorily it is the stevedore as the employer that owes the longshoreman a "safe place to work", which includes inspection of the equipment. 33 U.S.C. § 941; 29 C.F.R. 1918.1; 29 C.F.R. 1918.51(b). A vessel owner owes only the limited duties to the longshoreman as outlined in Scindia, which do not impose on the owner an absolute duty to provide a safe place to work. Treadaway v. Societe Anonyme Louis-Dreyfus, 894 F.2d 161, 166 (5 Cir. 1990).

Plaintiff contends that Daybrook breached its turnover and intervention duties because it had knowledge that the hold of the vessel was "steep" and the conditions of the hold were slippery, yet Daybrook failed to remedy the situation. To support this contention plaintiff relies on his testimony that he informed his superiors at safety meetings that conditions on the fishing vessels were slippery. However, actual knowledge of a dangerous condition is insufficient in and of itself to impose § 905(b) liability. Scindia , *supra*, at 1626.

In addition, plaintiff cites Turner v. Costa Line Cargo Services, Inc., 744 F.2d 505, 507-508 (5 Cir. 1984) and Fernandez v. M/V Rio Limay, 572 So.2d 730 (La.App. 4 Cir. 1990) to support his assertion that defendant breached the first and third Scindia duties. In Turner a longshoreman sued a vessel owner for injuries he sustained when he fell on an

oil slick that was leaking from a pile of debris located outside of the cargo operation area. In upholding the district court's imposition of liability on the owner, the United States Court of Appeal Fifth Circuit focused on the fact that the dunnage and oil slick were outside of the work area of the stevedore crew; in addition, the court took notice of the fact that the stevedore foreman twice urged the vessel owner to eliminate the dangerous condition. Id. at 507-508.

Unlike Turner, plaintiff has not presented evidence that on the night of his accident that he or anyone else complained about the unsafe conditions in the hatch, contrarily, plaintiff testified that conditions on that night were as usual. Moreover, also unlike Turner, the evidence indicates that the area in which plaintiff was injured was in the control of the stevedore at all times. Plaintiff has not contended otherwise.

Plaintiff also cites Fernandez to stand for the proposition that "slippery and slimy conditions constitutes actionable § 905(b) negligence." We agree with plaintiff that such conditions may be actionable under § 905(b), but such conditions are not present in the instant case.

In Fernandez , a longshoreman slipped on a puddle of water that had accumulated from a dripping drainpipe leaking from a swimming pool on the above deck. An expert testified that it was not the water that was dangerous, but the accumulation of algae and slime under the water which created the hazard. In a per curiam, this court upheld the trial court's finding of liability by applying a two-part test annunciated in Treadaway which requires that a plaintiff prove 1) the vessel put the foreign substance on the deck or knew it was there, and willfully or negligently failed to remove it; 2) the foreign substance had been on the deck for along time so

that it could have been discovered and removed by the vessel crew in its exercise of reasonable care. Treadaway, *supra*, at 166. Plaintiff has not alleged either element of the Treadaway test. Moreover, the conditions of which plaintiff complains, the water and the slime, were not foreign substances on the MARIA C, but an integral part of the stevedore operations and a constant in the pogy industry, unlike the conditions in Fernandez and Treadaway. This court can not imagine that such conditions are removable. Therefore, we find plaintiff's reliance on Turner and Fernandez misdirected.

To defeat plaintiff's claims defendant argues that the "steepness" of the vessel, and it slipperiness, are an integral part of the vessel as a result of its design, thus even if such a conditions are hazardous, the hazard exists in the design and is not actionable under § 905(b). *See*, Salvato v. Hakko Maritime Corp., 718 F.Supp. 1443 (N.D. Cal. 1989); Treadaway, *supra,* at n.24. We agree.

As the testimony bore out, the steepness of the MARIA C is not a result of Daybrooks' actions or inactions as vessel owner, but is an inherent part of the vessel that can only be remedied by changing the design or modifying the vessel. There is no evidence that Daybrook designed or modified the MARIA C. As testified by plaintiff the floor of the MARIA C is fine and slippery by nature, it is obvious to this court that when fish slime is added to the floor it would become more slippery. Furthermore, plaintiff indicated that he was fully aware of the steepness and slipperiness of the hold as he had been on the MARIA C. hundreds of times, and that conditions on the night of the accident were as usual. In these hundreds of times plaintiff had never been injured, neither did he present any evidence that any other

longshoreman had been injured on the MARIA C.

Plaintiff's expert, David Cole, marine safety expert, testified that if a steel grate was installed in part of the hold some of the slipperiness could be averted. However, this expert had never conducted any studies regarding the steel grate or had never seen such a remedy in place on a pogy boat. He had only witnessed such a system on shrimp boats, which he admitted are designed differently.

Contrarily defendant's witness, Gordon Wallace, executive vice president and general manager of Daybrook Fisheries, testified that he had been in the pogy industry since 1971. He stated that all pogy boats were either made of steel or concrete. Wallace also stated that he had never witnessed such a grate on any pogy boat in the industry. We find this testimony persuasive in light of the fact that plaintiff has failed to present any evidence to contradict the testimony that industry standards differ. We can not impose upon Daybrook a requirement that the industry does not implement.

As in Salvato, we find that plaintiff's claims regarding the steepness of the vessel and its slipperiness are complaints of a design defect, which are claims of unseaworthiness and are non-actionable under § 905(b).

In addition, the trial court's finding that "slippery water being recirculated" and inadequate lighting were causes of plaintiff's injury was also in error. Although these conditions may be causes of plaintiff's injury, they are insufficient to impose §905(b) liability upon Daybrook. The Fifth Circuit has stressed that the "basic principle which emerges from Scindia is that the primary responsibility for the safety

of the longshoremen rests upon the stevedore." Randolph v. Laeisz, 896 F.2d 964, 970 (5 Cir. 1990). To trigger a breach of the intervention duty a stevedore's continued operations must be so "obviously improvident" as to "present an unreasonable risk of harm to the longshoreman." We do not find that such conditions exist in the instant case.

The water being used by the MARIA C's bailers was derived from a canal adjacent to the dock. The water proceeds through a series of pipes to a land-based re-circulating unit, where the water is filtered multiple times to remove particles. Wallace testified that such systems were used throughout the pogy industry. In addition, several parties, including plaintiff, testified it is the bailer who has control over the pressure of the water and can order a change of water if necessary. Wallace agreed that the bailer and/or supervisor has the authority to request a water change.

Plaintiff has presented no evidence that the water on the night of the incident was hazardous. As plaintiff testified, conditions on that the night were as usual, and the MARIA C was the first vessel of the night to be unloaded. More important, plaintiff fails to present evidence that the water process was ever out of the stevedore's control or that the continued use of the system was "obviously improvident" as to present an unreasonable risk of harm. Therefore, the finding by the trial judge that the dirty water imputes § 905(b) liability was in error.

We find the same holds true regarding the lighting. First, it must be noted that plaintiff has never alleged that the lighting was inadequate, this was only a finding by the trial court. Second, as in the case of the water, there is no evidence to indicate that the lighting was not in complete con-

trol of the stevedore. According to the testimony, the lights used in the hold were dangled from the dock into the hold of the vessel. Once again, this court can find no evidence that such conditions were so dangerous as to require Daybrook as vessel owner to have intervened during the bailing process. Because of this, the court is unable to find a reason why Daybrook as vessel owner could not rely on the stevedore operations to ensure that the lighting was adequate. *See also*, 29 C.F.R. § 1918.92(a).

As stated above we are not assisted by plaintiff's counsel that Daybrook breached any Scindia duty. Plaintiff fails to articulate any reasons other than Daybrook's knowledge of the alleged hazards to support a finding otherwise. Instead, plaintiff makes a conclusory, assertion that such duties were breached without making a legal argument. Although not stated in his brief, at oral argument plaintiff argued to the court that it should not look at Daybrook as a "wearer of two hats", which is an argument contrary to the law.

This court does not doubt that plaintiff suffered debilitating injuries resulting from a fall on the M/V Maria C, however, we can not impose liability under 33 U.S.C. § 905(b) on Daybrook Industries, Inc. and thereby reverse.

COURT OF APPEAL, FOURTH CIRCUIT
STATE OF LOUISIANA

Clerk's Office, New Orleans APR 3 0 1999

DEAR SIR:

REHEARING WAS THIS DAY REFUSED IN THE CASE ENTITLED

THEODORE H. HOLMES V. DAYBROOK FISHERIES, INC.

No. 98-CA-1824

Very Truty yours,

POSTED

DANIELLE A SCHOTT
CLERK OF COURT

APPENDIX C

The Supreme Court of the State of Louisiana

THEODORE H. HOLMES

VS. NO. 99-C - 1571

DAYBROOK FISHERIES, INC.

IN RE: Holmes, Theodore H.; Holmes, Starla; - Plaintiff(s); Applying for Writ of Certiorari and/or Review; Parish of Plaquemines 25th Judicial District Court Div."A" Number 39-165; to the Court of Appeal, Fourth Circuit, Number 98CA-1824

- - - - - - - - -

September 24, 1999

Denied.

WFM

CDK

JPV

CDT

CALOGERO, C.J. would grant the writ.

LEMMON, J. would grant the writ.

JOHNSON, J. not on panel.

KNOLL, J. would grant the writ.

Supreme Court of Louisiana
September 24, 1999

Rai T. Dayle
Deputy Clerk of Court
For the Court

APPENDIX D

The Supreme Court of the State of Louisiana

THEODORE H. HOLMES

VS. NO. 99-C - 1571

DAYBROOK FISHERIES, INC.

- - - - - - - - - -

IN RE: Holmes, Theodore H.; Holmes, Starla; - Plaintiff(s); Applying for Reconsideration of this Court's action dated September 24, 1999; Parish of Plaquemines 25th Judicial District Court Div. "A" Number 39-165; to the Court of Appeal, Fourth Circuit, Number 98CA-1824

- - - - - - - - -

November 12, 1999

Reconsideration denied, Judgment is definitive.

PFC
WFM
HTL
CDK
JPV
CDT
JTK

JOHNSON, J.,not on panel.

Supreme Court of Louisiana
November 12, 1999

Katherine A. Fontano
Deputy Clerk of Court
For the Court